Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

ZENOBIA HAMILTON RAINEY,

Petitioner,

vs.

ROBERT LEE CHEVER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a biological parent of a child born out of wedlock is entitled to constitutional protection of a right to gain financially from the death of the child, where during the child's life that parent never took any responsibility with respect to the supervision, education, protection, or care of the child, and totally failed to grasp the opportunity to develop a significant familial relationship with the child?

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OPINIONS BELOW

The order of the Superior Court of Gwinnett County, Georgia (Pet. App. A) is unpublished. The Supreme Court of Georgia affirmed with a written opinion (Pet. App. B) and denied a motion for reconsideration (Pet. App. C). The decision of the Supreme Court of Georgia is reported at ___ Ga. ___, ___ S.E.2d ___, 1999 Ga. LEXIS 58 (1999).

STATEMENT OF BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered January 19, 1999, and the motion for reconsideration was denied February 19, 1999.

This court has jurisdiction pursuant to 28 U.S.C. § 1257, in that this case involves a final judgment rendered by the highest court of the State of Georgia, and involves a question of whether a statute of the State of Georgia is repugnant to the Constitution of the United States.

The Supreme Court of Georgia, a state court of last resort, has in this case decided a question of federal constitutional law of broad public importance in a way that conflicts with prior relevant decisions of this Court, and that addresses an issue which has not been, but should be, settled by this Court.

The Attorney General of Georgia filed a brief in the Supreme Court of Georgia, supporting the Petitioner's position regarding constitutionality of the statute in question. Pursuant to Rule 29(4)(c), notice is hereby given that

constitutionality of a statute of the State of Georgia affecting the public interest is in question, so that 28 U.S.C. § 2403(b) may apply.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

United States Constitution, Amendment 14, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Official Code of Georgia § 53-2-20 (formerly § 53-4-30):

> "Paragraph (1) of this subsection notwithstanding, neither the father nor any paternal kin shall inherit from or through a child born out of wedlock if it shall be established, by a preponderance of evidence, that the father, during his lifetime and after the birth of the child, *failed or refused to openly treat the child as his own* or failed or refused to provide support for the child."

STATEMENT OF THE CASE

This case arises from the death of DeAndre Bernard Hamilton (hereinafter "child"), who at age twenty was a student at the State University of West Georgia and a member of the college cheerleading squad. In August 1997, a college van crashed due to a manufacturing defect in a tire. He and two other cheerleaders were killed, and nine others were seriously injured.

Petitioner is the mother of the child, having borne him out of wedlock as an adolescent in rural Georgia in 1977. However, she went on to finish college and become a social worker. Respondent is the biological father of the child, but for twenty years he failed or refused to openly treat the child as his own son.

a. Record and Decision in the Superior Court.

Petitioner filed in the Superior Court of Gwinnett County, Georgia, a Petition to Determine Rights of Heirs pursuant to O.C.G.A. § 53-2-20 (formerly § 53-4-30) contending that Respondent "failed or refused to openly treat the child as his own" and therefore should be barred from inheriting.

The Superior Court's ruling is limited to consideration of whether the subject statute on its face violates equal protection.

However, it is undisputed that the Respondent never took any responsibility for supervision, education, protection, or care of the child. Deposition and affidavit evidence filed in Superior Court with a motion for summary judgment unequivocally supports Petitioner's contention that Respondent failed or refused to openly treat the child as his own. Respondent never initiated any contact with the child. Although Respondent lived within

a mile from the child for about eighteen years and was in no way barred from developing a relationship with the child, he had no contact or communication with the child from the day of the child's birth until the child was about fifteen years old. At that time the child, along with other teenagers sired by Respondent, went to Respondent's house and confronted him with the fact of their paternity. Respondent had only six to eight very brief, sporadic contacts with the child, all initiated by the child as a teenager living in the same neighborhood. Respondent never legitimated the child, never visited the child after the day of his birth, and did not give the child his name. He was unaware of the sports teams on which the child played, unaware of when and where the child graduated from high school, apparently did not know what college the child attended until after the child's death, and never had any correspondence or telephone calls with the child.

When the child applied for college admission, he drew a line through the blank for "father".

By contrast, it is undisputed that the Petitioner did take responsibility for supervision, education, protection, and care of the child, although she did accept very substantial help from her mother. The child's residence at the time of his death was in the home of Petitioner, his mother. He had a close, affectionate familial relationship with Petitioner, her husband, and Petitioner's other children.

When the child died, however, Respondent was the first person – out of all the families of killed or injured students – to file a tort suit, seeking half of all monetary

damages for the death of the son he had shunned for twenty years.

In Superior Court, Respondent contended that O.C.G.A. § 53-2-20 (formerly § 53-4-30) violates equal protection under the Fourteenth Amendment to the United States Constitution because it creates a gender-based classification. Petitioner replied with two affidavits on public policy considerations and legislative intent.

First is the affidavit of Patrick F. Fagan, a former Deputy Assistant Secretary for Family and Social Services Policy of the U.S. Department of Health and Human Services, who is now the William H.G. FitzGerald Fellow in Family and Cultural Issues at The Heritage Foundation. Mr. Fagan discussed at length the public policy concerns regarding the consequences of fatherlessness, and the relationship of the subject statute to those governmental objectives. (Pet. App. D).

Second is the affidavit of State Representative William C. Randall, Chairman of the Special Judiciary Committee of the Georgia House of Representatives, sponsor of the legislation now codified as O.C.G.A. § 53-2-4(b)(2) (formerly O.C.G.A. § 53-4-5(b)(2)) (House Bill 251, 1991 Session). (Pet. App. E).

The Superior Court disregarded all evidence of Respondent's lack of relationship with or responsibility toward the child, as well as the Fagan and Randall affidavits. Its order of summary judgment was limited to finding O.C.G.A. § 53-2-4(b)(2) (formerly O.C.G.A. § 53-4-5(b)(2)) facially unconstitutional due to the existence of a gender-based classification. (Pet. App. F).

b. Appeal to the Supreme Court of Georgia.

The Supreme Court of Georgia affirmed on the ground that O.C.G.A. § 53-2-4(b)(2) (formerly O.C.G.A. § 53-4-5(b)(2)) violates equal protection due to a gender based classification. (Pet. App. B).

In reaching its decision, the Supreme Court of Georgia:

- Misapplied this Court's splintered decision in *Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998). Concurring opinions in *Miller*, citing *U.S. v. Virginia, infra*, left room for confusion regarding the distinction between equal protection concerns about gender-based classifications and the lack of constitutional protection for parents who have failed to take advantage of the opportunity to develop a significant familial relationship with the child, and who never took any responsibility with respect to the supervision, education, protection, or care of a child.
- Misapplied this Court's decision in *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264 (1996). While gender-based classifications are suspect, they are not necessarily fatal. *U.S. v. Virginia* does not relate in any way to the position of a biological father claiming a right to profit from the death of an out of wedlock child he had shunned in life. Conversely, this case does not involve closure of any legitimate "gates of opportunity" for economic, social or educational advancement of either gender, or any overbroad generalization about abilities, talents, capacities or preferences of either gender.
- Misapplied this Court's decision in *Parham v. Hughes*, 441 U.S. 347, 60 L. Ed. 2d 269, 99 S. Ct. 1742 (1979), the only case this Court has decided on the rights of a father of a child born out of wedlock to get money due to the death of the child. The court disregarded the fact that paternity was not in question in *Parham*, and disregarded this Court's concern for the vital importance of a parent's conduct demonstrating responsibility for a child born out of wedlock.
- Disregarded the following relevant decisions of this Court, which are in direct conflict with the decision in this case: *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983).

ARGUMENT AND CITATION OF AUTHORITY

A. A biological parent of a child born out of wedlock is not entitled to constitutional protection of the right to inherit from the estate of that child, where the biological parent failed to develop a significant familial relationship with the child, never initiated any contact with the child, and never took any responsibility with respect to the daily supervision, education, protection, or care of the child.

Does any biological parent have a constitutional right to reap a financial windfall from the death of an out of wedlock child with whom he (or she) had no significant familial relationship, and for whom he (or she) shouldered no responsibility for supervision, education, protection or care? In such a situation, does it matter that a state statute was not worded in perfectly gender-neutral language? This Court has never suggested the existence of such a right.

However, the Supreme Court of Georgia apparently found this Court's splintered decision in *Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed. 2d 575

(1998) sufficiently confusing that it was led to strike down a state statute because it was not expressed in purely gender-neutral terms, without regard for the Respondent's lack of relationship with or responsibility toward the child. The result is to allow such a father to reap a financial windfall from the death of the child he had shunned in life, and to set a dangerous precedent for other jurisdictions.

1. **In its sole decision dealing with the rights of the biological father of a child born out of wedlock to benefit financially from the death of the child, this Court approved a statute that barred wrongful death recovery by a father unless he had formally legitimated the child, even though paternity was undisputed and a genuine familial relationship existed.**

Parham v. Hughes, 441 U.S. 347, 60 L. Ed. 2d 269, 99 S. Ct. 1742 (1979), a Georgia wrongful death case, is the only decision of this Court involving the rights of an illegitimate father after the death of the child.

In *Parham*, it was undisputed that Parham was the biological father, that he consented to be identified as the father on the birth certificate of a child born out of wedlock, that he regularly supported the child, and that he had daily contact with the child before the collision that killed the mother and child.

However, this Court upheld a statute that completely barred a father from recovering for the wrongful death of his child born out of wedlock unless the father had formally legitimated the child. Despite the evidence of the

father's involvement with the child, the Court concluded that the Georgia statute did not invidiously discriminate against the appellant simply because he is of the male sex, so the statute passed constitutional muster, even though the statute was not expressed in gender-neutral terms. 441 U.S. at 355. While *obiter dicta* included discussion of the difficulties of proving paternity, which was uncontested in *Parham* as it is in this case, the Court's holding was based upon the father's voluntary conduct in failing to legitimate the child. The Court concluded that "the statutory classification does not discriminate against fathers as a class but instead distinguishes between fathers who have legitimated their children and those who have not." 441 U.S. 347 at 356.

This Court also clearly distinguished the father's right to sue for money damages after the death of a child from the father's right to raise his own children. 441 U.S. at 358-59.

As in *Parham*, the biological father in this case seeks to benefit financially from the death of a child he sired out of wedlock. Unlike the father in *Parham*, the Respondent did not have a familial relationship with the child.

2. **This Court has properly found that a biological father of a child born out of wedlock has a constitutionally protected right to protect a familial relationship with a living child.**

In *Stanley v. Illinois*, 405 U.S. 645 (1972), an unwed father had lived with his children all their lives and had lived with their mother for 18 years, though he never

married the mother. An Illinois statute conclusively presumed every father of a child born out of wedlock to be an unfit person to have custody of his children, so that the facts of his familial relationship with the children were deemed irrelevant. When the mother died, the children were made wards of the state without a hearing, even though there was nothing in the record to indicate that the father had been neglectful or had not cared for his children. This Court properly found a violation of due process in taking those children away from the unmarried father with whom they had lived in a family unit all their lives, without a hearing and a particularized finding that the father was actually unfit.

In *Caban v. Mohammed*, 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760 (1978), a New York adoption case, this Court struck down a statute which allowed a mother of a child born out of wedlock to block adoption of her child simply by withholding her consent, but allowed the illegitimate father to block adoption of the child only by showing adoption was not in the children's best interest. In that case, the father had lived with the mother for several years, representing themselves as husband and wife though they were never legally married. The father was identified as the father on the children's birth certificates, and maintained consistent contact with the children after separating from the mother.

In those circumstances, the Court found that the gender-based distinction between fathers and mothers was not substantially related to an important governmental objective. However, the Court noted "the importance in cases of this kind of the relationship that in fact exists between the parent and child," 441 U.S. at 393 (n. 14), and

that the Court did "not question a State's right to . . . provide that fathers who have abandoned their children have no right to block adoption of those children." The Court's rationale in striking down the New York statute included the fact that it discriminated against unwed fathers "even when . . . they have manifested a significant paternal interest in the child." 441 U.S. at 393.

In so doing, the Court noted that in rejecting an unmarried father's constitutional claim in *Quilloin, infra*, it had "emphasized the importance of the appellant's failure to act as a father toward his children, noting that he 'has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.' " 441 U.S. at 389.

In both *Stanley* and *Caban*, this Court properly protested the due process and equal protection rights of those who had demonstrated real parental concern and involvement with their children, fathers who – in the words of the Georgia statute – "openly treat(ed) the child as his own."

3. This Court has found a biological father of a child born out of wedlock has no constitutionally protected right, even in his potential relationship with a living child, where he has not grasped the opportunity to establish a significant familial relationship, and has never shouldered any significant responsibility with respect to the supervision, education, protection, or care of the child.

In *Quilloin v. Walcott*, 434 U.S. 246 (1978), a Georgia adoption case, the biological father of a child born out of

wedlock sought to block stepparent adoption by the husband of the twelve-year-old child's mother. The Georgia adoption statute at that time allowed adoption of a child born out of wedlock with the mother's consent only, unless the biological father had previously legitimated the child. That biological father was more involved than Respondent was in the life of the child in this case, in that Quilloin had consented to be identified as father on the child's birth certificate, had many visits with the child, and gave the child toys and gifts. However, in eleven years he never filed a petition for legitimation or shouldered any significant responsibility with respect to the child's supervision, education, protection, or care. Like the child in this case, the child had lived with his maternal grandmother for a period of time, but eventually lived with his mother and her husband. Quilloin filed a petition for legitimation only after the stepfather filed a petition for adoption. The trial court found that adoption by the stepfather was in the best interests of the child, and legitimation by the biological father was not, and the Supreme Court of Georgia affirmed.

In *Quilloin*, Justice Marshall cited *Stanley v. Illinois*, 405 U.S. 645 (1972) for the principle that an unwed father's "interest in 'the companionship, care, custody and management' of his children is 'cognizable and substantial'." However, the biological father "has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities. . . . " 434 U.S. at 256. Therefore, the unanimous Court found no violation

of the biological father's rights of due process or equal protection, even though the statute was not expressed in gender-neutral terms.

In *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983), a New York adoption case, the biological father complained of lack of notice of the mother's husband's petition to adopt the two-year-old child. The biological father had lived with the mother prior to the child's birth and visited her in the hospital when the child was born, but his name did not appear on the child's birth certificate, he did not live with the mother or child after the child's birth, he had never provided them with any financial support, and he had never offered to marry the mother. As in *Quilloin*, after the stepfather filed a petition for adoption, the biological father filed a paternity petition and sought visitation. The biological father contended that his rights of equal protection and due process were violated by the post-*Caban* New York adoption statute.

In *Lehr*, Justice Stevens' plurality opinion noted a long line of precedents for the principle that the rights of the parents are a counterpart of the responsibilities they have assumed. Quoting Justice Stewart's dissent in *Caban*, Justice Stevens wrote that, "Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, . . . it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." This rationale is further developed as follows:

The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "[coming] forward to participate in the rearing of his child," *Caban*, 441 U.S., at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "[acts] as a father toward his children." . . . But the mere existence of a biological link does not merit equivalent constitutional protection. . . . The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie. 463 U.S. at 261-62.

Regarding the father's contention of invidious gender-based discrimination in that the mother was accorded rights different from those of the father of a child born out of wedlock, the Court (Stevens, J.), wrote:

> In *Quilloin v. Walcott*, we noted that the putative father, like appellant, "[had] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his

exemption from these responsibilities. . . ." [cit. omitted] We therefore found that a Georgia statute that always required a mother's consent to the adoption of a child born out of wedlock, but required the father's consent only if he had legitimated the child, did not violate the Equal Protection Clause. Because appellant, like the father in *Quilloin*, has never established a substantial relationship with his daughter, . . . the New York statutes at issue in this case did not operate to deny appellant equal protection. . . . If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights. 463 U.S. at 266-67.

See also, *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989).

Most recently, in *Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998), the Court's judgment reaffirmed the principle that "fathers and mothers of children born out of wedlock are not similarly situated." In *Miller*, the biological father stipulated to paternity of a young adult Filipino woman who was conceived when the father was serving with the U.S. Air Force in the Phillipines, and supported his out of wedlock daughter's application for registration as a U.S. citizen by birth based upon her being the child of a U.S. citizen. However, 8 U.S.C. § 1409(a)(4) provided that children born abroad and out of wedlock to citizen fathers and alien mothers had to obtain formal proof of paternity by age 18 in order to acquire United States citizenship by birth, while that requirement did not apply to children born abroad to

citizen mothers and alien fathers. The daughter alleged that the statute's different treatment of citizen fathers and citizen mothers was an unjustified gender classification that violated the father's federal constitutional right to equal protection. The Court rejected that claim.

There was no majority opinion. Justice Stevens announced the judgment of the Court in an opinion joined by Chief Justice Rehnquist. Citing *Parham* and *Lehr*, Justice Stevens rejected the equal protection claim, noting that "mothers and fathers of illegitimate children are not similarly situated," 140 L. Ed. 2d 575 at 585, and that any "unfavorable gender-based treatment was attributable to Mr. Miller's failure to take appropriate action within 21 years." 140 L. Ed. 2d 594.

Justices O'Connor and Kennedy concurred in the judgment on the ground that the daughter had no standing to argue the issue of gender-based discrimination against her father as she was not in the class of persons allegedly discriminated against. Justices Scalia and Thomas also concurred in the judgment only, joining in an opinion that the Court has no power to confer citizenship on a basis other than that prescribed by Congress.

Finally, Justices Ginsberg, Souter and Breyer dissented. Justice Ginsberg's dissent goes through an in-depth account of the history of U.S. immigration law before concluding that the "gates of opportunity" should not be controlled so as to "exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females' or 'rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.'" Justice Breyer's dissent includes

criticism of the immigration statute for not distinguishing between caretaking and non-caretaking parents, rather than using gender-based classification.

The case at the bar is readily distinguishable from *Miller* in that this case does not deal with a relationship of a father with a living child, or with legitimate "gates of opportunity" for social, economic or educational advancement of the child. Rather, this case involves only the asserted right of a biological father to benefit financially from the death of a child he sired out of wedlock but shunned in life.

4. There is a significant difference between the right to cultivate a relationship with a living child and the right to inherit from a deceased child, where a biological father failed to cultivate a significant familial relationship or shoulder any significant responsibility for the child when the child was alive.

Stanley, Quilloin, Caban, Lehr, Michael H. and *Miller* all dealt in some way with the rights of biological fathers of children born out of wedlock to cultivate and preserve relationships with living children. The law under these cases is that a biological father who has "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child" is entitled to constitutional protection of that parental relationship. If he has not done so, then the relationship even with a living child is not constitutionally protected.

Death closes all. In this mortal realm, once a child is dead no parent can begin to undertake "any significant

responsibility with respect to the daily supervision, education, protection, or care of the child". The uninvolved parent's tardy remorse cannot change that.

Parham recognizes that sad reality. The Georgia Supreme Court does not.

5. The statute in question does not close any legitimate "gate of opportunity" for a biological father who failed to openly treat a child as his own.

In contrast to *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264 (1996), the statute in this case does not involve invidious gender-based discrimination. There is no restriction on a biological father's cultivation of relationship with a living child. The statute does not denigrate either gender, or close any "gate of opportunity" for social, economic or educational advancement based on merit. It does not perpetuate legal, social or economic inferiority of either gender. The statute in this case merely recognizes inherent differences in the roles of men and women who are not fungible in human reproduction – between women who necessarily bear children with their bodies and men who are physically capable of playing no role beyond that of a sperm donor.

6. The statute, as applied in this case, does not discriminate against Respondent just because he is a man. Rather, it makes a valid distinction between classes of fathers on the basis of voluntary conduct and personal responsibility toward a child.

While not worded in perfectly gender-neutral language, the statute does not rely upon overbroad gender-

based stereotypes. It does not discriminate between men and women on the basis of overbroad generalizations about different talents, capacities or preferences of males and females. Rather, as applied in this case, it distinguishes between two classes of men on the basis of conduct. Those who sire children out of wedlock and openly treat them as their own may inherit from such children. Those who fail or refuse to openly treat such children as their own may not inherit. The rationales discussed in the Randall and Fagan affidavits do constitute sufficiently persuasive justification for the classification in the statute.

The parties would be similarly situated, and Respondent would be denied equal protection, only if there were a contention that Petitioner had also failed or refused to openly treat the child as her own.

That is not the case. There has been no contention that Petitioner failed to openly treat the child as her own son. It is beyond dispute that Petitioner, albeit with great help from her mother, did shoulder substantial responsibility for the supervision, education, protection, and care of her son throughout his life. It is likewise beyond genuine dispute that Respondent had the opportunity to do all of that, but did none of it.

B. This case presents a clean vehicle for the Court to establish a clear precedent holding that, notwithstanding the lack of perfectly gender-neutral language in a statute, no biological parent of a child born out of wedlock has a constitutionally protected right to reap a financial windfall from the death of a child with whom he or she had no significant familial relationship, and for whom he or she shouldered no responsibility for the child's supervision, education, protection, or care.

This case involves no convoluted consideration of facts and evidence, as those were simply not addressed or ruled upon by the courts below. It is limited to consideration of a single issue of federal constitutional law considered in the abstract, applied to a simply worded state statute. The contentions argued in the lower courts present the question clearly. Both legal and moral dimensions of the case are clear cut. Moreover, the result of the decision appealed from is morally egregious. Thus, the Court has a clear opportunity to concisely and emphatically clarify a point of federal constitutional law that has become unfortunately muddled with morally reprehensible results.

Respectfully submitted,

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APPENDIX

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APPENDIX A

In the Supreme Court of Georgia

Decided: **JAN 19 1999**

S98A1518. RAINEY v. CHEVER.

HUNSTEIN, Justice.

Twenty-year-old DeAndre Bernard Hamilton was killed in an automobile accident in August 1997. Hamilton was born out of wedlock to his mother, appellant Rainey. Chever is Hamilton's biological father as his paternity was judicially established in January 1979. In November 1997, Rainey filed an action to have Chever's rights of inheritance severed under OCGA § 53-4-5(b)(2). That statute was recodified in substantial part effective January 1, 1998 as OCGA § 53-2-4(b)(2) and precludes the father of a child born out of wedlock from inheriting from the child if he failed or refused to openly treat the child as his own or failed or refused to provide support for the child. Rainey moved for summary judgment alleging that Chever failed or refused to openly treat Hamilton as his child. Chever filed a cross motion for summary judgment alleging that current OCGA § 53-2-4(b)(2) violates the equal protection guarantees contained in both the Georgia and United States Constitutions. The trial court denied Rainey's motion and instead granted Chever's motion for summary judgment finding that the statute creates a gender-based classification such that a father of a child born out of wedlock cannot inherit from his child if he failed or refused to openly treat the child as his own, but a mother who acts in the same manner can inherit from the child and that there is no legitimate state interest achieved by not subjecting mothers of illegitimate

children to the same standards of conduct. We affirm, holding that OCGA § 53-2-4(b)(2), former OCGA § 53-4-5(b)(2), creates a gender-based classification in violation of the equal protection clauses of both the United States and Georgia constitutions. See U.S. Const. Amend. XIV, § 1; Ga. Const. of 1983, Art. I, Sec. I, Par. II.

1. The State and Rainey argue that OCGA § 53-2-4(b)(2) does not create a gender-based classification because the statute distinguishes not between mothers and fathers but between fathers who treat their illegitimate child as their own and those who do not. We disagree. OCGA § 53-2-4(b) provides that a father of a child born out of wedlock may inherit from the child born out of wedlock in the same manner as if the child were legitimate if the child is legitimized or paternity established by one of the methods identified in subsection (b)(1). Notwithstanding the legitimization of the child or proof of paternity under subsection (b)(1), subsection (b)(2) imposes an additional obligation upon a father before he may inherit from a child born out of wedlock, i.e., the father must not have failed or refused openly to treat the child as his own or failed or refused to provide support for the child. Id. The same obligations are not imposed by any version of the statute upon similarly situated mothers. Under Georgia law, the mother of a child born out of wedlock is permitted to inherit from the child as though the child were legitimate without any precondition as to recognition of the child or having provided support for the child. OCGA § 53-2-4(a). Therefore, by its plain language, OCGA § 53-2-4(b)(2) creates a gender-based classification in that only fathers of children born out of wedlock must openly treat the child as

their own and provide support for the child in order to inherit from the child.

2. Gender-based classifications are subject to a strong presumption of constitutional invalidity. *United States v. Virginia*, 518 US 515 (IV) (116 SC 2264,135 LE2d 735) (1996). A statute containing a gender-based classification violates equal protection unless the classification furthers important governmental objectives, and the discriminatory means employed are "substantially related" to the achievement of those governmental objectives. *Reed v. Reed*, 404 US 71, 76 (92 SC 251, 30 LE2d 225) (1971); *Franklin v. Hill*, 264 Ga. 302, 303(1) (444 SE2d 778) (1994). The justification for making a gender-based classification proffered by the State must be "exceedingly persuasive," genuine, and not hypothesized, *United States v. Virginia*, supra at 533, and it "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. [Cits.]" Id. See also *Craig v. Boren*, 429 US 190(11)(C) (97 SC 451, 50 LE2d 397) (1976).

Both Rainey and the State contend that OCGA § 53-2-4(b)(2) advances the State's interest in encouraging fathers to take responsibility for their children born out of wedlock and encouraging parental responsibility by precluding an uninvolved father from profiting from the death of a child born out of wedlock. While these may be legitimate State interests, neither justify the additional obligations OCGA § 53-2-4(b)(2) imposes solely upon fathers of children born out of wedlock. Although the State has an important interest in encouraging fathers to take responsibility for children born out of wedlock, the State has an equally important interest in encouraging the

identical behavior in mothers. Therefore, the State interest proffered to support subsection (b)(2) does not justify a classification based solely on the gender of the parent. We reject the argument that mothers are less likely than fathers to abandon children born out of wedlock as reliant on stereotypes and overbroad generalizations. See *Miller v. Albright*, ___ US ___ (118 SC 1428, 1440(V), 140 LE2d 575) (1998) (Court agreed it would be unlikely that any gender classification based on stereotypes could survive heightened scrutiny). Moreover, the State's reliance on *Parham v. Hughes*, 441 US 347 (99 SC 1742, 60 LE2d 269) (1979) is misplaced as different policy considerations are at issue. The State's interest recognized in *Parham*, namely, avoiding problems in proving paternity, is not applicable to our analysis of OCGA § 53-2-4(b)(2) because such interest is advanced by the requirement under subsection (b)(1) that the father judicially establish paternity prior to the death of the child. Accordingly, there being no "exceedingly persuasive" justification for treating the inheritance rights of mothers and fathers of children born out of wedlock differently, we find OCGA § 53-2-4(b)(2) to be unconstitutional.

Judgment affirmed. All the Justices concur.

APPENDIX B

(LOGO) **SUPREME COURT OF GEORGIA**
Case No. S98AI518

Atlanta February 11, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Zenobia Rainey v. Robert Lee Chever

Upon consideration of the Motion to Stay Remittitur filed in this case, it is ordered that it be hereby denied.

(LOGO) **SUPREME COURT OF THE STATE OF GEORGIA**
Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stenchcomb
Chief Deputy Clerk

APPENDIX C

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

MRS. ZENOBIA RAINEY,	**CIVIL ACTION FILE NO. 97-A-8028-3**
Petitioner,	
v.	**PETITIONER'S MOTION FOR SUMMARY JUDGMENT**
ROBERT LEE CHEVER,	
Respondent.	**and**
	RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

AND

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

(Filed May, 1998)

The parties to the above styled action having filed cross motions for summary judgment and said motions having come on for hearing before me on the 29th day of April, 1998; the Court, having considered the briefs and argument of counsel, makes the following findings and conclusions of law:

1) With the Respondent having satisfied the conditions of O.C.G.A. § 53-2-4(B)(1) [formerly O.C.G.A. § 53-4-5(B)(1)] by judicially establishing paternity in the

January 4, 1979 order of the Superior Court of Turner County, Civil Action File No. 2433 (Exhibit 1 to Respondent's motion), this Court finds that the Petitioner and Respondent were similarly situated under the intent and purpose of the statutory scheme set forth in O.C.G.A. § 53-2-4 as well as under the directives of the United States Supreme Court in the case of *Parnham v. Hughes*, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979).

2) The Court finds that the provisions of O.C.G.A. § 53-2-4(B)(2) [formerly O.C.G.A. § 53-4-5(B)(2)] create a gender classification such that a father (or any paternal kin) of an illegitimate child cannot inherit from his child if he failed or refused to openly treat the child as his own or failed or refused to provide support for the child, but a mother (or any maternal kin) who acts in the same manner can inherit from the child. In other words, the statute fails to address the issue of inheritance by a mother who has abandoned her illegitimate child. "To withstand constitutional challenge, a gender-based classification must serve important governmental objectives." *Franklin v. Hill*, 264 Ga. 302, 303 (1994) (internal citations and punctuation omitted). Upon examination, the Court can find no legitimate state interest or important objective which is advanced or achieved by singling out fathers of illegitimate children while not subjecting mothers of illegitimate children to the same standards of conduct. Therefore, this Court concludes that O.C.G.A. § 53-2-4(B)(2) [formerly O.C.G.A. § 53-4-5(B)(2)] is constitutionally invalid in that it violates the federal and state equal protection guarantees. *See, e.g., Tolbert v. Murrell*, 253 Ga. 566(3) (1984); *Franklin, supra* at 303 (and the cases cited therein).

3) Accordingly, with there being no other statutory or legal reason to deny Respondent his rights of inheritance from the estate of his deceased son, Petitioner's Motion for Summary Judgment is **DENIED** and Respondent's Motion for Summary Judgment is **GRANTED.** The Court therefore need not address any disputed factual issues concerning Respondent's alleged failure or refusal to openly treat the child as his own or to provide support for the child.

SO ORDERED this 8th day of May, 1998.

/s/ Dawson Jackson
DAWSON JACKSON
Judge, Gwinnett Superior Court

Copies to:
Kenneth L. Shigley
Craig Alan Webster

APPENDIX D

AFFIDAVIT OF PATRICK F. FAGAN

(Filed May 7, 1998)

1.

My name is Patrick F. Fagan. I am over eighteen years of age, have no legal disability, and give this affidavit on the basis of personal knowledge and on my training, study, experience and research in the fields of psychology, sociology, family structure, urban policy, the breakdown of the family in America, crime, and cultural issues.

2.

I earned a master's degree in psychology at University College Dublin and have pursued doctoral studies at The American University. Before becoming involved in public policy matters as a Legislative Analyst for a United States Senator, I was a family therapist, sociologist, and behavioral consultant in the inner city and elsewhere. During the Bush Administration, I served as Deputy Assistant Secretary for Family and Social Services Policy of the U.S. Department of Health and Human Services.

3.

Currently, I am the William H.G. FitzGerald Fellow in Family and Cultural Issues at The Heritage Foundation, 214 Massachusetts Avenue, NE, Washington, DC 20002, where I focus on urban policy, the breakdown of the

family in America, crime, and cultural issues. The Heritage Foundation is a research and educational institute whose mission is to formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense. My research and writing at The Heritage Foundation pertinent to the subject matter of this affidavit are the following: "Rising Illegitimacy: America's Social Catastrophe," *F.Y.I.* No. 19, June 29, 1994; "The Child Abuse Crisis: The Disintegration of Marriage, Family and the American Community," *Backgrounder* No. 1115, May 15, 1997; "The Real Root Causes of Crime: The Breakdown of Marriage, Family and Community," *Backgrounder* No. 1026, March 17, 1995.

4.

I have been asked to render a public policy analysis as to whether a particular Georgia statute is substantially related to achievement of important governmental objectives. O.C.G.A. § 53-4-5(b)(2) provides as follows:

> "Paragraph (1) of this subsection notwithstanding, neither the father nor any paternal kin shall inherit from or through a child born out of wedlock if it shall be established, by a preponderance of evidence, that the father, during his lifetime and after the birth of the child, failed or refused to openly treat the child as his own or failed or refused to provide support for the child."

5.

Over the past generation, the American family has been weakened by two widespread patterns undermining the institution of marriage: giving birth to children born out of wedlock, and divorce. Among all demographic groups in all parts of the United States, there has been a steady upward trend in out-of-wedlock births. From 1980 to 1995, the percentage of births out of wedlock rose from 11% to 25.3% among whites, and from 58% to 69.9% among blacks. In some areas of the United States, the percentage of out-of-wedlock births among blacks exceeded 80% in 1995.

6.

Children pay a high price for growing up without the presence and involvement of a father. Studies of children born out-of-wedlock reveal that among the principal effects of birth out-of-wedlock and growing up without the presence and active involvement of a father are: lower newborn health and increased risk of early infant death; retarded cognitive and verbal development; lowered educational achievement; lowered levels of job attainment; increased behavioral problems; lowered ability to control impulses; warped social development; increased dependence on welfare; increased exposure to crime; and increased risk of being physically or sexually abused. All of these effects of out-of-wedlock births support a strong state interest in discouraging out-of-wedlock births and paternal irresponsibility.

7.

Research over several decades has indicated that a biological father of a child born out of wedlock is unlikely to maintain any consistent relationship with the mother and child out of wedlock. Follow-up studies of mothers who kept their babies shows that less than 10% of fathers of children born out of wedlock had consistently kept in touch with the mothers and children for even a few months after the birth out of wedlock, and that the fathers tended to provide financial support only as required by court order.

8.

The virtual extinction of two-parent families in poor inner-city neighborhoods, which is related to a high proportion of out-of-wedlock births and single-parent families, has contributed greatly to the collapse of those neighborhoods. The absence of fathers often means there is no adult male to give financial support, a guiding hand, or protection for children. The result is the prevalence of gangs of violent young men, young girls vulnerable to abuse, children having children, and mindless violent crime. Under such conditions, parental supervision of adolescent and pre-adolescent children is almost impossible. Neighborhoods without fathers are neighborhoods without men able and willing to confront errant youth, chase threatening gangs, and reproach delinquent fathers. Children raised in these neighborhoods are likely to learn to accept and use physical violence to satisfy their wants and needs. A state-by-state analysis of statistics from the FBI Crime Index and from the National

Center for Health Statistics reveals that each 10% increase in out-of-wedlock births is associated with a 17% increase in violent teenage crime. One study, consistent with virtually all literature on the subject, indicates that the relationship between crime and one-parent families is so strong that controlling for family configuration erases the relationship between race and crime and between low income and crime. The effect of out-of-wedlock births on crime, community disintegration and public order, and the resulting increase in requirements for public expenditures for police, prisons and welfare, constitutes a legitimate state interest in discouraging out-of-wedlock births and paternal irresponsibility.

9.

Researchers have found that boys from fatherless homes tend to be less vigorous, less well adjusted in their peer relations, more likely to strive for compensatory masculinity, more immature, more anxious about sex, and more effeminate than boys who had consistent fathering. The absence of the father may result in a boy failing to develop a positive male identity, resulting in rage against women and against society. In addition, researchers have found that fatherless children are likely to be more impulsive and choose immediate rewards over those that must be delayed. Antisocial behavior of the sort likely to get a youngster into serious trouble has been reported more often, on "anonymous confession" surveys, by father-absent young men than by those whose fathers had been in the home. There is some indication that the absence of a father may lead a young boy to confuse being "good" with being feminine, so that to be masculine, he must be

"bad." Research also reveals that a disproportionate number of prostitutes, drug addicts, unwed mothers and other deviants came from homes lacking a stable father figure in the home. All of these adverse social consequences of out-of-wedlock births and fatherlessness support a strong state interest in discouraging out-of-wedlock births and paternal irresponsibility.

10.

Mothers of children born out of wedlock are also adversely affected. Adolescent single females who bear children out of wedlock are much more likely than others to fail to fulfill their educational and occupational potential, live in poverty, suffer poor self esteem, and become dependent upon public governmental welfare programs. This negative social and economic effects of such underdevelopment of human capital in the work force, combined with the cost of increased welfare costs, constitutes a strong state interest in discouraging out-of-wedlock births and paternal irresponsibility.

11.

Fathers of children born out-of-wedlock may also be adversely affected. Some research indicates that young men who rely upon sex to prove their masculinity and maturity, without taking responsibility for others, frequently shirk responsibility for children they sire. That very shirking of responsibility for their progeny, however, may rob them of their sense of masculinity and reinforce their tendencies toward irresponsibility. This may in turn contribute to the fathers' failure to fulfill

educational and occupational potential, with resulting social and economic costs to society. This supports a strong state interest in discouraging out-of-wedlock births and paternal irresponsibility.

12.

The pattern of disinvestment of paternal time and commitment has effects even greater than lack of economic support from fathers. Fatherlessness contributes to a decline of character and competence in children, with common effects ranging from school misconduct to decline of manners to juvenile crime. Increase of fatherlessness in society leads to more boys with guns and more girls with babies.

13.

While Code Section 53-4-5(b)(2) does treat men differently from women, that distinction appears to reflect the real biological differences between men and women with regard to childbirth and child-rearing. Females are the only people who get pregnant and give birth. They, far more than fathers, are for that reason likely to experience significant parent-child bonding and to take responsibility for child-care from the beginning. Mothers of children born out-of-wedlock, if they do not give up the children for adoption, are likely to raise the children themselves and/or with the assistance of their mothers or other family members. Female relatives are often heavily involved in assisting with child-rearing, particularly in black families. If mothers of children born out-of-wedlock

completely abdicate responsibility for caring for the children or arranging for their care within the extended family, they are much more likely than fathers to be subjected to legal proceedings to place the children in foster care and to terminate their parental rights. On the other hand, fathers of children born out-of-wedlock, may much more easily just absent themselves and never have any personal involvement with a child, particularly if their sexual and personal association with the mother has ended, and there are no social bonds of marriage and legitimacy to give the father a moral sense of paternal responsibility. Because of these biological and social factors related arising from pregnancy and childbirth, but often continuing through the life of a child born out of wedlock, mothers and fathers of children born out-of-wedlock are not similarly situated.

14.

Georgia Code Section 53-4-5(b)(2) serves in [sic] to eliminate a potential, though perhaps infrequent, incentive for paternal irresponsibility. Males are capable of impregnating numerous women and girls within a relatively short time period. Males who view their masculinity primarily in terms of sexual conquests sometimes do that. If even a few such men who father children out-of-wedlock, but fail to demonstrate a consistent commitment to assume the burdens of parenthood or to establish a substantial familial relationship to the child, are permitted to enjoy a financial windfall from the death of a child, that is likely to become part of the common knowledge or folklore among young men who are otherwise inclined to personal, sexual and paternal irresponsibility. In the

minds of some undetermined proportion of such men, the possibility of such a windfall may become virtually another form of a lottery, encouraging them to impregnate even more women and girls in order to increase the possibility that one of their illegitimate offspring might die under circumstances that would result in a financial windfall to the father. However irrational that notion may seem to mature and educated minds, it is likely to appeal to an undetermined proportion of undereducated, irresponsible and sexually promiscuous young men.

15.

In my opinion, Georgia Code Section 53-4-5(b)(2) does not discriminate against fathers of children born out of wedlock simply because they are members of the male sex. Rather, it distinguishes between two categories of men who sire children out of wedlock: those who do both provide financial support and openly treat their children as their own, and those who do not do those things. While courts can order men to pay child support or go to jail, it is generally up to the father to voluntarily choose whether or not to shoulder the other responsibilities of fatherhood, the meaning of which should be obvious to any man who cares to think even a little bit about the role of a father toward his child.

FURTHER AFFIANT SAYETH NOT.

This 5th day of May, 1998.

/s/ Patrick F. Fagan
Patrick F. Fagan

Sworn to and subscribed before me
this 5th day of May, 1998.

Notary Public /s/ Kathleen M. Rowan

My Commission Expires: February 14, 2000

(SEAL)

APPENDIX E

AFFIDAVIT OF WILLIAM C. RANDALL

(Filed May 7, 1998)

1. My name is William C. Randall. I am over 18 years of age, have no legal disability, and give this affidavit on the basis of personal knowledge.

2. I am a graduate of Emory University School of Law, have practiced law in Georgia since June 1970, and was first elected as State Representative from Bibb County in 1974. I am Chairman of the Special Judiciary Committee of the Georgia house of Representatives, and I have held that position at all times pertinent to the subject matter of this affidavit. I also serve as a member of the House Rules Committee and the House Health & Ecology Committee.

3. In the 1991 session of the Georgia General Assembly, I sponsored House Bill 251, which was passed into law and is codified as O.C.G.A. 53-4-5(b)(2). This legislation provides, in pertinent part, as follows:

> "(2) Paragraph (1) of this subsection notwithstanding, neither the father nor any paternal kin shall inherit from or through a child born out of wedlock if shall be established, by a preponderance of evidence, that the father, during his lifetime and after the birth of the child, failed or refused to openly treat the child as his own or failed or refused to provide support for the child."

4. This legislation was drafted, proposed and passed because of situations that had come to the attention of members of the General Assembly in which a father of a child, born out of wedlock had failed to form a substantial parental relationship with a child, failed to provide support for the child, or both, and then

came forward seeking to profit from the death of the child. The most prominent example that immediately comes to my mind involved a child who had become a professional athlete and made a lot of money, and upon the adult child's death the father who had nothing to do with the child as he was growing up came forward to make a claim as an heir to the adult child's estate. We were also aware that there could be other applications of this, such as an uninvolved biological father making a claim to a child's estate claim in the event of the wrongful death of a child.

5. This legislation was drafted in terms applying to fathers of children born out of wedlock because we found no instances of mothers of children born out of wedlock having little or nothing to do with their children. In our legislative hearings, the only examples of parents of children born out of wedlock failed to openly treat their children as their own did involve fathers. Based upon the information presented in our hearings, and observation of behavior patterns in our own communities, we found a widespread problem of fathers of children born out of wedlock failing or refusing to accept responsibility with regard to child-rearing, failing or refusing to develop of substantial family relationships with their children, and failing or refusing to provide support except as is compelled by the courts under threat of going to jail.

6. The phrase "failed or refused to openly treat the child as his own" was considered to be clear to people of ordinary common sense who are familiar with the conduct of parents in this society, and flexible enough to be applied in the facts of individual cases. It should be clear that this would involve something more than a few sporadic contacts initiated by the child seeking to get to know his or her father who had been totally uninvolved while the child was growing up.

7. I am an African-American legislator, an active member of the NAACP, and have long been deeply concerned about questions of civil rights, due process and equal protection. This legislation was not based upon any traditional stereotypes of male and female gender roles, but rather upon widespread conduct of fathers of children born out of wedlock which was reported in testimony before the Special Judiciary Committee, and which we observed in our own communities. It is based upon real differences in the conduct of men and women in the real world, apparently arising out of the real biological differences in their roles related to conception, pregnancy and childbirth. If we had found any indication of the existence of a widespread conduct of that sort among mothers, we would not have made the legislation specific to fathers only. However, no evidence of such conduct among mothers of children born out of wedlock came to our attention. Apparently, if a mother of a child born out of wedlock totally fails to treat the child as her own, most such cases would be dealt with through Child Protective Services taking action for termination of her parental rights, and her rights of inheritance would not become an issue. Therefore, we dealt with reality in human behavior related to real differences rather than mere stereotypes or an abstract ideal, and addressed what we saw as real, widespread problem of irresponsibility among fathers of children born out of wedlock.

8. The intent and the effect of this legislation is not to discriminate against men because they are men, but rather to distinguish between two categories of fathers of children born out of wedlock, based upon their conduct. Those men who father children out of wedlock, but both provide support and openly treat their children as their own, may inherit from a child born out of wedlock. Only those who do not do both

of those things are barred from inheriting from a child born out of wedlock.

9. In my opinion as a legislator, the state does have a [sic] strong an interest in discouraging irresponsible conduct by biological fathers of children born out of wedlock. Members of the General Assembly are generally aware of a correlation between problems of fatherlessness of children born out of wedlock, and problems of juvenile crime, welfare costs, prison costs, and deterioration of community institutions. If men who are inclined to father children out of wedlock by a number of different women and girls were to hear examples of such men profiting from the death of a child for whom they had taken no substantial responsibility, that would only encourage some of them to irresponsibly impregnate still more women and girls out of wedlock, siring more children for whom they would take no substantial responsibility. This statute should remove the potential for men reaping a windfall profit from death of child born out of wedlock for whom the man accept [sic] no substantial responsibility, which is both a subject of righteous moral condemnation and a conduct which the state has a substantial interest in deterring. In my opinion, this legislation thus serves a legitimate governmental interest.

FURTHER AFFIANT SAYETH NOT.

/s/ William C. Randall
William C. Randall

Sworn to and subscribed
before me this 6th day of
May, 1998.

/s/ Janet R. Gray
Notary Public, Georgia
County of Bibb

My Commission Expires 06-30-2000